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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

15 Cr. 867 (RMB)

5 REZA ZARRAB,

6 Defendant.

Curcio Hearing

7 -----x

8 New York, N.Y.
9 January 5, 2017
9:08 a.m.

10 Before:

11 HON. RICHARD M. BERMAN,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
17 Southern District of New York

18 BY: SIDHARDHA KAMARAJU , ESQ.

19 DAVID W. DENTON, JR., ESQ.

20 MICHAEL D. LOCKARD, ESQ.

21 Assistant United States Attorneys

22 BRAFMAN & ASSOCIATES, PC

23 Attorneys for Defendant

24 BY: BENJAMIN BRAFMAN, ESQ.

25 JOSHUA KIRSHNER, ESQ.

KIRKLAND & ELLIS LLP

Attorneys for Defendant

BY: VIET D. DINH, ESQ.

EDMUND G. LaCOUR, JR., ESQ.

SULLIVAN & WORCESTER

Attorneys for Defendant

BY: HARRY H. RIMM, ESQ.

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APPEARANCES
(Continued)

ALSO PRESENT: JENNIFER McREYNOLDS, FBI Agent
SCOTT GEISSLER, FBI Agent

ALSO PRESENT: ASIYE KAY, Interpreter (Turkish)

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1 THE COURT: Good morning, everybody. Please be
2 seated. Happy new year.

3 So this is a continuation and a likely conclusion of
4 the *Curcio* proceeding that we began some sessions ago. I
5 should note for the record that we have a Turkish language
6 interpreter and ask Mr. Zarrab if he is able to understand
7 these proceedings with the help of the interpreter.

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Before I start, is there any information
10 that was outstanding from either the government or the defense
11 side that I should be aware of?

12 MR. KAMARAJU: Nothing from the government, your
13 Honor.

14 MR. BRAFMAN: Nothing from the defense, your Honor.

15 THE COURT: Okay. So what I plan to do today,
16 Mr. Brafman, is to ask Mr. Zarrab the *Curcio* questions
17 substantially in the form that you have submitted them to me.
18 You'll hear some edits that I've made in asking the questions.
19 If you have any issues with that, you can raise them as you see
20 fit. And I probably have added a few questions. I did not
21 recall, and don't, whether Mr. Rimm and/or you have gone over
22 in particular the HSBC representation by Kirkland & Ellis with
23 Mr. Zarrab, in particular, and/or the JPMorgan Chase Bank
24 representation.

25 MR. BRAFMAN: Mr. Zarrab is aware of the general

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1 concerns that the Court has about the Kirkland & Ellis
2 representation of banks in general, and I'm not certain which
3 bank matters specifically to Mr. Zarrab, but they may be of
4 concern to your Honor. But I think he's prepared to answer
5 your questions.

6 MR. RIMM: Your Honor, in my meeting on
7 December 13th of last year, we discussed, among other things,
8 the HSBC matter and the Second Circuit appeal involving
9 Kirkland & Ellis lawyers. We also discussed the JPMorgan Chase
10 waiver and the Supreme Court appeal involving Kirkland & Ellis
11 lawyers.

12 THE COURT: Okay. Good. And after we finish that, as
13 I indicated in the memo or order in the last couple of days,
14 I'm happy to hear any comments from the government and from the
15 defense, and Mr. Rimm, if he wishes to join in, with respect to
16 the *Curcio* issues. I don't plan to rule today but will rule
17 shortly after the close of today's proceedings.

18 So if we could swear in Mr. Zarrab.

19 THE DEPUTY CLERK: Sir, if you could stand for a
20 moment, please, and raise your right hand.

21 (Defendant sworn)

22 THE DEPUTY CLERK: Thank you, sir. You may be seated.

23 THE COURT: And Mr. Zarrab, you understand that now
24 that you're under oath, your answers must be truthful to the
25 questions that I pose.

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1 THE DEFENDANT: Yes.

2 THE COURT: Okay. So I'm going to ask you, as I think
3 you're aware, a series of questions regarding your counsel,
4 particularly the counsel from the Kirkland & Ellis law firm. I
5 believe this is an important issue. And the issue is
6 essentially whether you should continue with Kirkland & Ellis,
7 who are Washington counsel, even though their law firm also
8 represents -- I believe the number is eight -- eight banks
9 which have been, in one way or another, implicated or involved
10 in the alleged crimes that you are said to have committed, and
11 those banks are HSBC, JPMorgan Chase, Bank of America, Deutsche
12 Bank, Wells Fargo bank, Citibank, Standard Chartered Bank, and
13 UBS. Did I miss any banks that --

14 MR. KAMARAJU: No, your Honor.

15 THE COURT: Okay. Sir, you understand what this
16 proceeding is about, do you?

17 THE DEFENDANT: Yes, I understand.

18 THE COURT: Okay. The purpose of my asking these
19 questions is to complete the written record. You should be
20 aware that I have not yet determined whether Kirkland & Ellis
21 should continue to represent you as counsel in this case. Do
22 you understand that?

23 THE DEFENDANT: I understand.

24 THE COURT: Okay. Could you start by telling us how
25 old you are.

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1 THE DEFENDANT: 33.

2 THE COURT: And your educational background? Any
3 degrees?

4 THE DEFENDANT: I graduated from high school.

5 THE COURT: And that was in Turkey?

6 THE DEFENDANT: Yes.

7 THE COURT: Okay. Are you currently taking any
8 medication?

9 THE DEFENDANT: Yes.

10 THE COURT: Could you tell us briefly --

11 THE DEFENDANT: I use Prozac.

12 THE COURT: Okay. And you take that on a regular
13 basis, on a daily basis?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: Okay. So that would be within the past 24
16 hours, I take it.

17 THE DEFENDANT: Yes.

18 THE COURT: How about any alcohol or other drugs or
19 medications in the past 24 hours?

20 THE DEFENDANT: No. I didn't take anything other than
21 that.

22 THE COURT: Okay. Is there anything that you are
23 aware of, including language differences, that might interfere
24 with your ability to understand my questions here in court
25 today?

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1 THE DEFENDANT: No, your Honor.

2 THE COURT: Okay. So let me start by asking you if
3 you are satisfied with the services of your attorneys thus far
4 in this case. And by that I mean all of your attorneys.

5 THE DEFENDANT: I am very happy with their services.

6 THE COURT: And are you satisfied with the legal
7 advice that they have given you?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Can you name the Kirkland & Ellis
10 attorneys in particular.

11 THE DEFENDANT: Attorney Viet Dinh and Edmund LaCour.

12 THE COURT: Thank you. And do you understand that
13 your attorneys are employed by several different law firms and
14 they may have different obligations from their obligations to
15 you; that is to say, they have obligations to other clients of
16 those law firms?

17 THE DEFENDANT: I'm aware of that.

18 THE COURT: And are you aware that on or about
19 September 12, 2016, there was an announcement that, including
20 Mr. Dinh and Mr. Clement and I believe also Mr. Harris and
21 Mr. LaCour, your attorneys who were with the firm of Bancroft,
22 it was announced that they would be joining Kirkland & Ellis?

23 THE DEFENDANT: Yes.

24 THE COURT: And are you also aware that they did in
25 fact join Kirkland & Ellis in the following month, in October

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1 of 2016?

2 THE DEFENDANT: Yes, your Honor.

3 THE COURT: Have Mr. Clement or Mr. Dinh or
4 Mr. Harris, or Mr. LaCour, for that matter, informed you that
5 the law firm with which they were previously associated,
6 namely, the Bancroft law firm, was -- I don't know if it was an
7 acquisition, there was some discussion about merger or
8 acquisition, but -- that those lawyers did join the firm of
9 Kirkland & Ellis in October 2016, I think on October 22? Is
10 that the official date?

11 MR. DINH: That's correct, your Honor.

12 THE COURT: Of 2016. Are you aware of that?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: And that those four gentlemen are
15 currently with the law firm of Kirkland & Ellis.

16 THE DEFENDANT: Yes.

17 THE COURT: Have any of your attorneys from the law
18 firm of Kirkland & Ellis informed you that their law firm
19 currently also represents, my understanding is, eight banks,
20 including the banks that I mentioned before -- namely, HSBC,
21 JPMorgan, Bank of America, Deutsche Bank, Wells Fargo Bank,
22 Citibank, Standard Chartered Bank, UBS -- and that the
23 government in this case involving you alleges that those banks
24 are victims of the conspiracies charged in the indictment
25 against you in this case?

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1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: And do you also know that, with respect to
3 two of those banks -- namely, HSBC and JPMorgan -- that at
4 least some of the Kirkland & Ellis attorneys -- Mr. Clement,
5 Mr. Dinh, and Mr. Harris -- are working currently and directly
6 for HSBC and JPMorgan Chase on two separate litigation matters?

7 THE DEFENDANT: Yes, your Honor.

8 THE COURT: And are you aware that one of those
9 matters -- that is to say, the HSBC matter -- stems from a
10 criminal case involving violation of economic sanctions against
11 Iran in which HSBC was accused of those violations?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Have any of your attorneys, your Kirkland
14 & Ellis counsel, informed you that they personally do
15 participate in representing two of those banks -- that is to
16 say, JPMorgan Chase and HSBC?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: And have they advised you that with
19 respect to other banks, while they may not participate in
20 representing those other banks, they nevertheless have ethical
21 obligations to the other banks because they are a client of the
22 law firm that they work for -- namely, Kirkland & Ellis?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: So you are then aware of this issue that
25 Kirkland & Ellis represents not only you but eight of the banks

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1 that I have mentioned simultaneously.

2 THE DEFENDANT: Yes, your Honor.

3 THE COURT: Do you understand that the fact that your
4 lawyers from Kirkland & Ellis represent you and simultaneously
5 represent a bank alleged to be victims in this case may lead
6 them to have loyalties divided between yourself on the one hand
7 and those banks on the other?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: And do you understand that while they may
10 have these divided loyalties, you nevertheless are entitled to
11 have counsel who have no divided loyalties, who are loyal only
12 to yourself?

13 THE DEFENDANT: Yes.

14 THE COURT: And do you understand that, as part of
15 these divided loyalties that Kirkland & Ellis lawyers have, in
16 some instances Kirkland & Ellis might have an incentive to put
17 the interests of those banks ahead of your own interests?

18 THE DEFENDANT: Yes.

19 THE COURT: So let me give you some examples of the
20 ways in which the allegiance of your lawyers from Kirkland &
21 Ellis could adversely affect their representation of you in
22 this case. And in doing so, I'm going to ask you if you are
23 aware that this dual representation could affect the way that
24 your lawyers from Kirkland & Ellis consider and advise you with
25 respect to the following:

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1 One would be whether and when you should plead guilty
2 in this case.

3 THE DEFENDANT: Yes.

4 THE COURT: Another would be whether and when you
5 should seek to cooperate with the government in this case.

6 THE DEFENDANT: Yes.

7 THE COURT: Another is what defenses you should raise
8 in this case in defending yourself.

9 THE DEFENDANT: Yes.

10 THE COURT: Another might be whether you should
11 testify at the trial in this case.

12 THE DEFENDANT: Yes.

13 THE COURT: Another area might be which witnesses,
14 including any bank witnesses, should be cross-examined and what
15 questions they should be asked.

16 THE DEFENDANT: Yes.

17 THE COURT: Another might be which witnesses should be
18 subpoenaed and called to testify and what other evidence should
19 be offered on your behalf.

20 THE DEFENDANT: Yes.

21 THE COURT: Another area might be what arguments
22 should be made on your behalf to the jury at a trial in this
23 matter.

24 THE DEFENDANT: Yes.

25 THE COURT: And another could be what arguments to

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1 make to the Court and what facts to bring to the Court's
2 attention before trial or during trial or, if there were a
3 trial and a conviction, at sentencing.

4 THE DEFENDANT: Yes.

5 THE COURT: So let me further expand on some of these
6 examples and ask you some additional questions related to the
7 ones we've just gone over.

8 One is: Do you understand that your attorneys from
9 Kirkland & Ellis may not wish to take positions in this case,
10 either before trial or during trial or at sentencing or on
11 appeal, that are critical of the banks that are clients of
12 their law firm?

13 THE DEFENDANT: Yes.

14 THE COURT: And they may not wish to do that even if
15 criticizing those banks might help in your defense.

16 THE DEFENDANT: Yes.

17 THE COURT: And do you understand that your attorneys
18 from Kirkland & Ellis will not be cross-examining witnesses who
19 are employees of the eight banks that I mentioned, should they
20 in fact testify at your trial?

21 THE DEFENDANT: Yes.

22 THE COURT: And are you aware that your attorneys from
23 Kirkland & Ellis may have access to or may have learned
24 information from the eight banks, including, without
25 limitation, HSBC and JPMorgan Chase?

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1 THE DEFENDANT: Yes.

2 THE COURT: And that they may in fact have learned or
3 have access to information that may be helpful to defending you
4 but that at the same time they are prohibited from using such
5 information to help you or defend you because of the
6 attorney-client privilege that applies to communications
7 between the Kirkland & Ellis attorneys and their bank client.

8 THE DEFENDANT: Yes.

9 THE COURT: Do you understand that your attorneys from
10 Kirkland & Ellis may be limited in making arguments about your
11 level of involvement in the offense or the crimes which are
12 alleged in this case to have occurred or of your role in those
13 offenses or in your culpability?

14 THE DEFENDANT: Yes.

15 THE COURT: And do you realize, for example, I believe
16 it was October 5, 2016, one of your Kirkland & Ellis attorneys,
17 Mr. Clement, argued in court against the bank fraud conspiracy
18 charged in the indictment in your case and he contended that if
19 that bank fraud alleged in the indictment were successful, that
20 the banks involved would be better off? Do you recall that?

21 THE DEFENDANT: Yes.

22 THE COURT: Then do you believe that you have an
23 understanding of each of these examples that I've mentioned
24 that discuss the potential impact of dual representation by
25 Kirkland & Ellis of yourself and the eight banks that I've

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1 mentioned?

2 THE DEFENDANT: Yes.

3 THE COURT: So would you tell me then, in your own
4 words, what your understanding is of the conflict issues that
5 we've been discussing that arise from the fact that Kirkland &
6 Ellis represent not only you but also eight banks that have
7 been implicated or involved in some fashion in the allegations
8 in the indictment here.

9 MR. BRAFMAN: May I have a moment, Judge?

10 THE COURT: Sure.

11 (Mr. Brafman conferring with defendant)

12 THE DEFENDANT: I understand all your issues that were
13 discussed in court previously and we're discussing right now.
14 I understand that attorneys at the firm --

15 THE COURT: I'm sorry. "I understand that"?

16 THE DEFENDANT: Attorneys at Viet's firm.

17 MR. BRAFMAN: Viet's firm.

18 THE COURT: That's Mr. Dinh?

19 THE DEFENDANT: Yes. They've been representing eight
20 banks that are involved in this case and in this indictment,
21 and I did speak to each of the lawyers about this and I'm aware
22 of their conflicts.

23 THE COURT: And are you aware also, as you indicated
24 in your response to my questions, of the fact that you are
25 entitled to but they are not conflict free as your counsel?

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1 THE DEFENDANT: Yes, I'm aware of this, and I'm
2 accepting all of these issues.

3 THE COURT: Do you understand that the greatest danger
4 to you in this matter of dual representation is the inability
5 of any of us to foresee all of the possible conflicts that
6 might arise because of Kirkland & Ellis' simultaneous
7 representation of these eight banks alleged to be, in your
8 case, victims on the one hand and the firm's representation of
9 you on the other hand?

10 THE DEFENDANT: Yes, I'm aware of it.

11 THE COURT: Are you also aware that seven of the eight
12 banks have issued written waivers of the dual representation?

13 THE DEFENDANT: I am aware of that. Except Citibank,
14 all of the other banks gave waivers.

15 THE COURT: And you're aware that Citibank refused to
16 enter into such a waiver.

17 THE DEFENDANT: Yes, I'm aware of it.

18 THE COURT: Okay. You understand that -- I think we
19 discussed this, but I'll mention it again because it's so
20 important -- that in every criminal case, including this one
21 involving you, the defendant, yourself, is entitled to the
22 assistance of counsel whose loyalty to him is undivided? You
23 realize that.

24 THE DEFENDANT: I'm aware of that.

25 THE COURT: And you are entitled to representation by

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1 attorneys who are not subject to any factors that might in any
2 way intrude upon their loyalty to your interests.

3 THE DEFENDANT: Yes.

4 THE COURT: Stated in another way, you understand, do
5 you, that you are entitled to attorneys who have only your
6 interests in mind and not the interests of any other client?

7 THE DEFENDANT: Yes.

8 THE COURT: Have you received any promises or threats
9 or inducements with regard to your choice of counsel in this
10 matter?

11 THE DEFENDANT: No.

12 THE COURT: And are you the one who has selected the
13 counsel who are representing you in this case?

14 THE DEFENDANT: Yes.

15 THE COURT: And do you understand that you have, and
16 you had, a right to consult with an attorney who is free of any
17 conflict of interest about this issue?

18 THE DEFENDANT: Yes.

19 THE COURT: And for that purpose the Court appointed
20 Mr. Rimm and has given you the opportunity to consult with him
21 with respect to any aspect of the information that I have been
22 discussing with you today.

23 THE DEFENDANT: Yes.

24 THE COURT: And just to confirm, we know that you
25 have, and Mr. Rimm has told us, but have you consulted with

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1 independent counsel about the conflicts or potential conflict
2 of interest issues that we have been discussing today?

3 THE DEFENDANT: Yes.

4 THE COURT: And has that counsel, in your opinion,
5 fully advised you about the situation?

6 THE DEFENDANT: Yes.

7 THE COURT: And do you wish to receive additional time
8 to consult with him?

9 THE DEFENDANT: No.

10 THE COURT: Incidentally, if you do at some point in
11 time, if you'd just let me know, I'd be happy to arrange that.

12 THE DEFENDANT: Of course.

13 THE COURT: So having discussed and considered all the
14 questions that I posed to you today and the answers that you
15 have given which relate to Kirkland & Ellis' representation of
16 you and also of the eight banks, as we have discussed, how that
17 might adversely affect your defense, do you nevertheless
18 believe that it's in your best interest to continue with
19 Kirkland & Ellis as one of the law firms representing you in
20 this matter? Is that your wish?

21 THE DEFENDANT: Yes.

22 THE COURT: And do you understand that by continuing
23 with Kirkland & Ellis as one of the law firms representing you,
24 you would be waiving your right to be represented solely by
25 attorneys who have no potential or actual conflict of interest?

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1 THE DEFENDANT: Yes.

2 THE COURT: And are you in your own mind knowingly and
3 voluntarily seeking to waive your right to conflict-free
4 representation in this case?

5 THE DEFENDANT: Yes.

6 THE COURT: And assuming there were an adverse ruling
7 in this case and assuming there were a conviction, do you also
8 waive any postconviction argument, on appeal or otherwise, that
9 as a result of Kirkland & Ellis' representation of the eight
10 banks alleged to be victims in this case, you were denied
11 effective legal representation?

12 THE DEFENDANT: Yes.

13 THE COURT: So you are also intending to waive the
14 right to argue that you were denied effective assistance of
15 counsel, is that correct?

16 THE DEFENDANT: Yes.

17 THE COURT: Is there any aspect of the matters I've
18 been discussing with you, any that you wish to have further
19 explained?

20 THE DEFENDANT: No. Thank you very much.

21 MR. BRAFMAN: Your Honor?

22 THE COURT: Yes.

23 MR. BRAFMAN: If I may, just for clarification.

24 THE COURT: Yes.

25 MR. BRAFMAN: Mr. Zarrah is waiving his right to argue

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1 on appeal, if there is a conviction, any claim of ineffective
2 assistance of counsel based on the potential conflicts should
3 Kirkland & Ellis lawyers remain in the case. That's the
4 limited waiver that he is making. If your Honor was to --

5 THE COURT: That was the question I was posing.

6 MR. BRAFMAN: Okay. I just wanted to make sure.
7 Thank you.

8 THE COURT: Yes.

9 Does government counsel wish to have me pose any
10 additional questions to Mr. Zarrah?

11 MR. KAMARAJU: Yes, your Honor. In particular, in
12 circumstances where counsel --

13 THE INTERPRETER: Excuse me, your Honor. I can't
14 hear.

15 THE COURT: Maybe if you could go to the podium, and
16 maybe if you could speak a little slower.

17 MR. KAMARAJU: Sure.

18 Is that better?

19 THE INTERPRETER: Thank you.

20 MR. KAMARAJU: Sure. In circumstances where counsel
21 is attempting to limit their representation to avoid a
22 conflict, the ethics opinions make clear that it's critical --

23 THE COURT: To avoid a conflict, what?

24 MR. KAMARAJU: The ethics opinions make clear that it
25 is critical that the client whose representation is being

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1 limited understands fully the scope of that limitation. Your
2 Honor questioned Mr. Zarrab about the waivers, but in
3 particular there are two provisions of some of the bank waivers
4 the government thinks the defendant should be specifically
5 allocuted on. The first was contained in Kirkland & Ellis'
6 letter from December 7th and related to the HSBC waiver. In
7 that letter, Kirkland wrote that Kirkland has further agreed
8 with HSBC that, to the extent consistent with its obligations
9 to Mr. Zarrab, Kirkland would allow HSBC to review any Kirkland
10 pleading that references HSBC to satisfy the bank that no
11 information Kirkland obtained in representing the bank is used
12 in Mr. Zarrab's defense. So the government would ask that the
13 Court inquire that Mr. Zarrab is aware of and understands that
14 limitation.

15 THE COURT: Okay. So I'm going to ask -- I take it
16 there are two questions you're going to have?

17 MR. KAMARAJU: Yes.

18 THE COURT: So I'm going to ask we take a brief pause
19 for you all to draft up the two questions that you would like
20 to have me pose to Mr. Zarrab, show them first to Mr. Brafman,
21 and if it's okay with him, I will ask those two questions.

22 And the second you're going to describe?

23 MR. KAMARAJU: Yes. The second question concerns the
24 Wells Fargo waiver. In the Wells Fargo waiver, that states
25 that the firm, Kirkland & Ellis, acknowledges and agrees that

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1 its representation of Zarrab, whether through trial or
2 appellate work, will not pertain to developing or advancing any
3 argument that Wells Fargo knew of, was complicit with, or
4 otherwise was not a victim of the alleged illegal transaction.
5 So we would ask the Court to ask that as well.

6 THE COURT: Okay. And Mr. Brafman, any additional
7 questions that you would like me to raise?

8 MR. BRAFMAN: No, your Honor. And if it saves time,
9 if the government would like to pose the questions themselves
10 and have the defendant respond, I understand the import of the
11 question. I think rather than drafting it, I would be happy to
12 proceed in that fashion.

13 THE COURT: I don't think it will take very long. I
14 see Mr. Lockard over there writing something down already, so
15 he's probably almost finished.

16 MR. BRAFMAN: Okay.

17 THE COURT: Okay. And how about Mr. Dinh, any
18 questions, additional questions you'd like to have posed?

19 MR. DINH: No, your Honor.

20 THE COURT: Okay. So just take a minute and take a
21 look at that.

22 Oh, Mr. Rimm, any questions additional that you'd like
23 me to pose?

24 MR. RIMM: No, your Honor.

25 THE COURT: Okay. So I've been handed a document

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1 which I'll call Court Exhibit A, and it includes four
2 additional questions, which I take it that counsel for the
3 government and the defense wish to have me ask Mr. Zarrab at
4 this time. Is that correct?

5 MR. KAMARAJU: Yes, your Honor.

6 MR. BRAFMAN: Yes, your Honor.

7 MR. DINH: Yes, your Honor.

8 THE COURT: Okay. So four more questions, Mr. Zarrab.
9 Mr. Rimm, did you want to look these questions over before I
10 ask them as well? Might as well.

11 MR. RIMM: I have no objection, your Honor. I've
12 discussed each of these issues with Mr. Zarrab.

13 THE COURT: So the first additional question is this,
14 Mr. Zarrab: Do you understand that Kirkland & Ellis has agreed
15 with HSBC that, to the extent consistent with its obligations
16 to you, Kirkland will allow HSBC to review any Kirkland
17 pleading that references HSBC to satisfy the bank, HSBC, that
18 no information which Kirkland obtains representing the bank is
19 used in your defense? Do you understand that?

20 THE DEFENDANT: Yes.

21 THE COURT: And the second of the four additional
22 questions is this: Do you, Mr. Zarrab, understand that
23 Kirkland & Ellis has agreed that its representation of you,
24 whether through trial or appellate work, will not pertain to
25 developing or advancing any argument that Wells Fargo knew of,

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1 was conflicted with, or otherwise was not a victim of the
2 alleged illegal transactions set forth in the indictment in
3 this case?

4 THE DEFENDANT: Yes.

5 THE COURT: And two further questions: Do you
6 understand that your attorneys from Kirkland & Ellis will be
7 unable to use or advise the use of court process to compel the
8 attendance of witnesses who are employees or agents of the
9 eight banks?

10 THE DEFENDANT: Yes.

11 THE COURT: And finally, do you understand that your
12 attorneys from Kirkland & Ellis will not only be unable to
13 personally take certain actions on your behalf -- like, for
14 example, accusing the banks of wrongdoing -- but that they also
15 will not be able to participate in any decision whether or not
16 to take such actions?

17 THE DEFENDANT: Yes.

18 THE COURT: Okay. So having asked those additional
19 questions, is the government satisfied with the *Curcio*
20 allocution this morning?

21 MR. KAMARAJU: Your Honor, the government still takes
22 the position that despite the *Curcio* --

23 THE COURT: I understand.

24 MR. KAMARAJU: But with respect to your questions,
25 yes.

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1 THE INTERPRETER: We can't hear.

2 MR. KAMARAJU: With respect to the questions, the
3 government is satisfied.

4 THE COURT: And how about the defense?

5 MR. BRAFMAN: Yes, your Honor.

6 THE COURT: Mr. Dinh?

7 MR. DINH: Yes, your Honor.

8 THE COURT: Okay. And Mr. Rimm, you're okay with it?

9 MR. RIMM: Yes, your Honor.

10 THE COURT: Okay. So that concludes the allocution
11 portion of the *Curcio* proceedings. And as I indicated, I'm
12 happy to hear from each side with respect to -- if they wish
13 to, they don't have to make any remarks -- with respect to this
14 conflict issue.

15 MR. KAMARAJU: Just a few words, your Honor.

16 THE COURT: Sure.

17 MR. KAMARAJU: And as your Honor noted, there's
18 already been considerable submissions, so I won't belabor
19 anything, but we just wanted to focus on --

20 THE COURT: I think you're talking about proposed
21 findings of fact and conclusions of law, which I found to be
22 very helpful from both sides. Very thorough and very helpful.

23 MR. KAMARAJU: Yes, your Honor. Along with all the
24 correspondence that both sides had submitted in advance of the
25 proposed findings. But there are I think some points that the

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1 government wants to emphasize with respect to that.

2 And in particular, the Court's obligation here, as the
3 Court recognized at a previous conference, is different than
4 that of an ethics professor or even defense counsel and the
5 government. The Court has the obligation to ensure, as a
6 balance, one, the defendant's right to counsel of his choice
7 against the defendant's Sixth Amendment right to conflict-free
8 counsel, the Court's own interest in preventing its decisions
9 from later attack, and the public's interest in the integrity
10 of the proceedings. In light of that legal responsibility, the
11 Court is given broad latitude, and the Supreme Court has
12 emphasized that repeatedly, as has the Second Circuit. And in
13 fact, to the government's knowledge, the Second Circuit has
14 never reversed a decision to disqualify counsel in a criminal
15 case. Now one of the reasons for that, the government would
16 submit --

17 THE COURT: One of the reasons for?

18 MR. KAMARAJU: For the latitude that the trial court
19 is afforded is that the trial court, just to paraphrase the
20 Supreme Court in *Wheat*, the trial court does not have the
21 benefit of making this decision after hearing all of the
22 arguments and witness testimony at a trial; it has to do it in
23 a much murkier context of a pretrial record. And the record
24 here, the government would submit, simply makes it impossible
25 to continue with Kirkland representing Mr. Zarrah. That record

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1 includes Kirkland's attempt, for example, to represent both a
2 defendant who is alleged to have victimized a number of banks
3 through a scheme that spans hundreds of transactions and
4 hundreds of millions of dollars' worth of transactions relating
5 to Iranian entities, and at the same time --

6 THE COURT: That would be Mr. Zarrah.

7 MR. KAMARAJU: That would be Mr. Zarrah. And at the
8 same time to represent eight of the banks that are alleged to
9 have been victimized by that conduct, one of which has already
10 stated that it does not wish to waive that conflict.

11 THE COURT: That would be Citibank.

12 MR. KAMARAJU: Correct. And the other seven banks,
13 which have stated specifically that they will only waive that
14 conflict in the context of very specific and rather onerous
15 restrictions. For example, we just questioned the defendant as
16 to the HSBC prereview or clearance provision. That provision,
17 for example, has an alleged victim reviewing work product
18 submitted on behalf of the person who is alleged to have
19 victimized them and giving the victim an opportunity to object.
20 That policing, that kind of --

21 THE COURT: Object to and veto.

22 MR. KAMARAJU: Object and veto and suggest
23 modifications if they wish to. But in other words, they have,
24 at least from the government's perspective, an unprecedented
25 amount of control of decisions made on behalf of a criminal

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1 defendant. Those are just some of the potential pitfalls that
2 could occur from the representation that Kirkland & Ellis
3 proposes. And that's why, in numerous cases -- and we've cited
4 them in our proposed findings and conclusions of law, but cases
5 like *Rahman, Yannotti* -- in those kinds of cases, courts have
6 specifically rejected this attempt to sort of cabin or limit a
7 counsel's representation of a criminal defendant, because those
8 courts have recognized that it's just too hard and too
9 difficult to avoid the pitfalls in what is a minefield; and a
10 minefield that any misstep could cause significant
11 consequences.

12 For example, we cited to your Honor the *Bright* case in
13 which a mistrial was declared on the basis of a conflict that
14 was discovered. That kind of situation, in a case like this,
15 where I think both sides have agreed it will be a lengthy and
16 rather complicated trial, to have that issue lingering out
17 there, we would submit, is untenable, and I think there's
18 already been some very concrete examples of how that's played
19 out here. And if your Honor will bear with me, I'll give you
20 an example.

21 The indictment in this case, the very first indictment
22 the defendant was arraigned on, made clear the government's
23 bank fraud theory and made clear the government was alleging
24 that banks had been defrauded. The Court found that on its
25 decision on the motion to dismiss. Soon after that, over the

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1 summer, in May and June, the government produced discovery,
2 including search warrant affidavits and spreadsheets, that
3 identified the banks that were the victims. In July, the
4 defendant filed a motion to dismiss that was submitted on
5 behalf of the defendant by, among others, Mr. Clement and
6 Mr. Dinh in which, as your Honor noted, they argued that the
7 bank fraud charges could not be sustained because the banks
8 were not victims. In fact, Mr. Clement even said that if the
9 scheme worked as planned, the banks would actually be better
10 off. There was oral argument on that, and then in October, I
11 believe October 28, 2016, they filed a motion to suppress the
12 results of the search of the defendant's email account based on
13 one of the search warrant affidavits that referenced the HSBC's
14 involvement in the case, with reference to all the other banks'
15 involvement in the case. On November 16th, the government
16 alerted defense counsel to the conflict, in the government's
17 view. Kirkland & Ellis then responded that they did not
18 believe there was a conflict and in fact had not been even
19 aware of the potential conflict until the government had
20 alerted them. In December, they then filed the Gillers
21 opinion, the opinion of Professor Gillers, in which he stated
22 that there was a conflict.

23 So I bring this timeline and chronology to the Court's
24 attention because, despite having all of the information about
25 the government's theory of the case, the government's proof,

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1 the identity of the victims, their own conflict checks,
2 Kirkland & Ellis was unable to determine that there was a
3 conflict for approximately six months, or seven months. So in
4 light of that, it's very difficult to have any confidence that
5 going forward, we'll be able to police or monitor how this
6 arrangement is supposed to work.

7 And for example, the Wells Fargo waiver that we just
8 spoke about, that contains a provision that says that Kirkland
9 & Ellis will not do any appellate work in which they claim that
10 Wells Fargo was not a victim. Well, it is. It has been made
11 very clear that one of the defenses that will be argued at
12 trial is that the bank is not a victim, either because they did
13 not suffer loss or because they were complicit. In fact,
14 Mr. Brafman made it explicit that Zarrab was not waiving the
15 defense that the banks could have been complicit. So if that
16 argument is raised at trial and if it is rejected, either by
17 the jury or by the Court, one could easily imagine how it would
18 become an appellate issue, and in that circumstance Kirkland &
19 Ellis has already promised Wells Fargo that it would not argue
20 that point on appeal. So right then and there is a concrete
21 example of how Mr. Zarrab is being robbed of effective
22 representation in a circumstance in which one of his defenses
23 cannot be pursued on appeal. And that affects every issue at
24 the trial.

25 For example, if there were jury instructions the

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1 defendant wanted, presumably, as strategic and appellate
2 counsel, Kirkland & Ellis would be involved in consulting how
3 to draft that, what the case law is that supports it. But
4 under the provisions of the Wells Fargo waiver, they would not
5 be allowed to do that. It's very difficult to see how that
6 kind of arrangement can work, can be monitored, can be policed,
7 in the first place.

8 And so from that perspective, we would submit that's
9 why courts have repeatedly rejected this type of arrangement.
10 Judge Pauley did so in the *Daugertas* case, and one of the
11 factors he noted was that the cooperating witness in that case
12 refused to waive the conflict. And he noted that that showed
13 some discomfort on the part of that witness with proceeding and
14 that he was concerned about that witness' right as well. Well,
15 in this case, the fact is that Citi has already said they will
16 not waive --

17 THE COURT: Citibank.

18 MR. KAMARAJU: Citibank, which evidences their
19 discomfort with this arrangement. And the other waivers
20 themselves are so nuanced and caveated that they provide
21 essentially no meaningful representation left to the defendant.

22 And I think this came up at one of the conferences in
23 which Mr. Dinh tried to articulate the scope of the limited
24 representation. And on one hand he said, well, we won't have
25 anything to do with the bank fraud charge. And the problem

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1 with that, of course, is that all of the other charges deal
2 with the conflict relating to the bank as well. The sanctions
3 charge is premised on facilitation of financial transactions
4 involving US banks. The money laundering charge is the same
5 way, as is the Klein conspiracy charged. All of those charges
6 are predicated on conduct with the banks. And so if he were to
7 limit himself to just the bank fraud charge and put that to the
8 side and not do any representation with respect to that, they
9 would still have an issue with the banks with respect to all
10 the other charges. At the same conference, Mr. Dinh later
11 said, we just won't have anything to do with the banks. We
12 just won't have anything to do with the banks themselves. But
13 if that's the case, then they've effectively written themselves
14 out of the case entirely.

15 And so those kinds of gray areas simply cannot be
16 tolerated in an arrangement in which the defendant's right to
17 conflict-free counsel is being implicated. And when it further
18 threatens to impact this trial going forward, it stands to
19 reason that there's no benefit to preserving that relationship,
20 particularly when the defendant will not be prejudiced in the
21 case. The defendant has a number of attorneys. His trial
22 counsel, as has been repeatedly stated, will be Mr. Brafman.
23 Mr. Brafman is not going anywhere. He has eight months before
24 trial. So to the extent he wished to retain additional
25 appellate or strategic counsel, he could, in addition to the

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1 numerous attorneys that he has. So this is not a circumstance
2 in which, shortly before trial, the defendant loses his trial
3 counsel. He still has more than enough to guarantee his
4 constitutional right to counsel.

5 Now essentially what Kirkland & Ellis' submission in
6 support of this limited representation says is, it says, well,
7 Professor Gillers says this is okay under New York ethics
8 rules, and as a result, it should be okay for the Court.
9 Respectfully, we think that Professor Gillers' opinion is
10 irrelevant and is incomplete to the point of having very little
11 value to the question before the Court. For instance, we've
12 already cited to your Honor the *Bernstein* decision in which the
13 Second Circuit criticized the use of these independent ethics
14 opinions, because they touch on matters of domestic law that
15 are for the Court.

16 But even setting that aside, Professor Gillers'
17 opinion is predicated on facts that just do not apply to this
18 case. He says, for example, that the waivers just shouldn't
19 matter, that they shouldn't be an issue and thus it shouldn't
20 matter if Citibank has not waived. But the Court rightfully
21 has already expressed its desire to know what the banks'
22 positions are because, as we all know, these waivers are
23 revocable. The banks, being tremendous clients of these law
24 firms, exercising tremendous amount of financial pressure,
25 could, as your Honor noted with HSBC, attempt to veto or alter

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1 positions that the defendant might take because they may injure
2 the bank. So the idea that the banks' views on this conflict
3 are simply irrelevant, we would take issue with.

4 But also, the limitations that Professor Gillers
5 discussed, they don't take into account, for example, the Wells
6 Fargo waiver in which Wells Fargo, as we've said, specifically
7 notes that Kirkland & Ellis cannot argue that they're a victim,
8 at any point, whether at trial or appellate work. So we would
9 submit that the Gillers opinion doesn't really get to the
10 question that the Court has to satisfy, which is, can this
11 arrangement work to protect both the defendant's right and the
12 Court's interest, and, frankly, the cases or the opinions that
13 the Gillers opinion relies on sort of show how different a
14 scenario you're talking about. I mean, the opinions that they
15 relied on or the cases they cite are civil cases in which
16 cross-claims are being filed and where the question is, can a
17 defense lawyer or can a lawyer limit their representation with
18 respect to types of business they may take or cross-claims.
19 They don't address the novel situation of a defense lawyer
20 attempting to say, I will just not deal with particular issues
21 in this specific case. The closest that cases come to it are
22 the cases we've cited to your Honor, where they involve
23 witnesses, cooperators, other defendants, and in those cases,
24 the courts have routinely rejected this approach.

25 If I may just have one minute, I may be done, but let

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1 me just check.

2 THE COURT: And I have a question for you.

3 MR. KAMARAJU: Okay. Yes, your Honor.

4 THE COURT: So the question I have is, most of your
5 oral presentation related to the potential conflicts. I
6 imagine it's your view also that there are actual conflicts.

7 MR. KAMARAJU: Yes, your Honor; in particular with
8 respect to HSBC.

9 THE COURT: And could you just explain that.

10 MR. KAMARAJU: Sure. So the representation of HSBC in
11 the Second Circuit relates to a deferred prosecution agreement
12 that HSBC entered into in 2012. That deferred prosecution
13 agreement was to resolve criminal charges against HSBC related
14 to HSBC's facilitation of various sanctions evasions, including
15 financial transactions that violated sanctions on Iran. So the
16 same kind of conduct that is at issue in this case. That case,
17 as part of the deferred prosecution agreement, there was a
18 monitorship that HSBC agreed to, and the monitor prepared
19 reports that detailed, according to the brief filed by Kirkland
20 & Ellis, detailed compliance efforts, compliance failures,
21 confidential client communications. It actually details what
22 had gone wrong at HSBC and what they were doing to try to
23 correct it. That report was filed by the government. The U.S.
24 Attorney's Office for the Eastern District of New York filed
25 that report initially under seal with the court. The court

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1 then expressed its intention to unseal that document from that
2 date of appeal, in which Mr. Dinh, Mr. Clement, and I believe
3 other attorneys from Kirkland & Ellis filed a brief in the
4 Second Circuit arguing for a writ of mandamus and that the
5 judge should not have unsealed the monitor's report.

6 So what you have there, you have an issue in which
7 they are representing HSBC specifically in a case involving
8 sanctions evasion, specifically in relation to a provision of
9 the agreement that resolved those charges, and at the same
10 time, and frankly, in a way that they will attempt to keep that
11 material out of the public eye. So they attempt to argue that
12 HSBC's conduct, as determined by the monitor, should not be
13 revealed to the public. That's the nature of the appeal. On
14 the other hand, in this case, it has been made very clear that
15 one of the potential defenses that Mr. Zarrab may make at trial
16 is that the banks knew what they were doing, the banks were
17 complicit in this, that the banks specifically knew in fact
18 that they were dealing with Iranian entities and nonetheless
19 processed the transactions anyway, which is the exact conduct
20 that HSBC has been charged with in the Eastern District. And
21 so it is very much -- if that defense is to be pursued --

22 THE COURT: "It is very much"?

23 MR. KAMARAJU: If that defense is to be pursued, it is
24 very much in Mr. Zarrab's interest to have a public airing
25 during trial of, for example, HSBC's compliance failures, or

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1 HSBC's desire to enter into those transactions. So at the same
2 time, on one hand --

3 THE COURT: What's the period covered by the report
4 sought to be kept confidential?

5 MR. KAMARAJU: The charges span two different time
6 periods, but I believe it is 2008 to 2012.

7 THE COURT: 2012. It overlaps with the charges in
8 this case.

9 MR. KAMARAJU: It does overlap with the charges in
10 this case, your Honor, and there are transactions with HSBC
11 that overlap during the time period. So there certainly are
12 factual overlaps, and we would say that's a substantially
13 related case in that the whole premise of the HSBC case in the
14 Second Circuit is keeping the reports about HSBC's facilitation
15 sealed. So --

16 THE COURT: Is it possible that that report actually
17 covers transactions that occurred in this case?

18 MR. KAMARAJU: It's possible. Your Honor, we have not
19 reviewed the report ourselves, but it's certainly possible, and
20 we do know that there are transactions with HSBC -- some of
21 those are detailed in the search warrant affidavit that we
22 supplied to your Honor -- during the time period covered by the
23 deferred prosecution agreement. So it would not be shocking if
24 the monitor's report touches on transactions that are either
25 linked directly to Mr. Zarrab or one of his co-conspirators and

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1 that could be subject to this prosecution.

2 So that's why, in a nutshell, we believe that's an
3 actual conflict and not just a potential conflict.

4 THE COURT: Thank you.

5 Okay. Mr. Dinh?

6 MR. DINH: Thank you, your Honor. May it please the
7 Court.

8 Thank you, your Honor, for your care and patience
9 throughout this process, because it is of a weighty nature, as
10 we all recognize, and we rest on our submission, as the
11 government does, and we only want to make one important and
12 critical point in addition or in characterization of the
13 matters before the Court.

14 All the cases that the government cites and all the
15 arguments that the government makes pertain to a situation that
16 is not applicable here. That situation is that the court was
17 evaluating the disqualification or choice of primary or sole
18 counsel in the case. I agree with the government that this
19 case is novel. Indeed, it is unprecedented, in our research,
20 where there is a *Curcio* hearing or a disqualification motion
21 related to *Curcio* that pertains to supplemental counsel. The
22 reason why that is unprecedented is twofold. One, at the end
23 of the day, or at the beginning and end of the day, the
24 question of conflict-free counsel is a protection of effective
25 assistance of counsel. And there is no question in this case

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1 that Mr. Zarrab has effective assistance of counsel in the form
2 of Mr. Brafman, his firm, and other firms associated with this
3 case. And so --

4 THE COURT: I'm not sure I'm following the argument.
5 You're saying it's okay because he has one effective lawyer but
6 it's okay that maybe one of the other lawyers is not effective?

7 MR. DINH: Yes, your Honor, in --

8 THE COURT: That's a proposition that is something
9 that I should sanction? Sanction in the sense of approve?

10 MR. DINH: We have not, in other cases, dealt with a
11 situation where there is a disqualification or a *Curcio* issue
12 raised with respect to supplemental counsel as opposed to
13 primary or sole counsel, and so the analysis that I would urge
14 upon your Honor, and it is urged upon your Honor and the court
15 from Professor Gillers, the second half of Professor Gillers'
16 opinion is that Kirkland & Ellis' representation of Mr. Zarrab,
17 however limited, is of value to Mr. Zarrab because it is
18 additive to the effective assistance of other counsel and so
19 Mr. Zarrab does not give up anything by Kirkland & Ellis'
20 additional team, however limited its representation may be, in
21 light of the potential conflicts, and so it is purely additive
22 to Mr. Zarrab's right to counsel. And so in the balance, if
23 you will, in the traditional *Curcio* proceeding between the
24 constitutional right to counsel of choice versus the
25 constitutional right to conflict-free or effective assistance

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1 of counsel, the second half is very, very low because we
2 already have primary counsel in Mr. Brafman and others in the
3 case.

4 THE COURT: I wonder if you couldn't also reach just
5 the opposite conclusion. In other words, where a court would
6 have to be more careful if it's primary counsel that is to be
7 considered to be relieved from the case, that's a weightier,
8 more complicated issue, seems to me, than a peripheral counsel
9 who has these conflicts.

10 MR. DINH: I understand that, your Honor, and that was
11 what the government was arguing with respect to the prejudice
12 argument.

13 THE COURT: Yes.

14 MR. DINH: And I take that to be the point that the
15 government made. However, however, offsetting all of that,
16 offsetting all of that is the undisputed defendant's right to
17 counsel of choice.

18 THE COURT: We know that.

19 MR. DINH: And the reason why I would submit that
20 these cases don't arise, that we have seen, that this is
21 unprecedented, is because the consequences of a denial of
22 counsel of choice is very, very grave. It is automatic -- it
23 is a structural violation, as we cite in our proposed findings
24 of fact.

25 THE COURT: But your arguments are relatively de

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1 minimis here because it's not the primary counsel.

2 MR. DINH: And the de minimis prejudice is not even
3 relevant because under the Supreme Court's teaching of the
4 *Gonzalez-Lopez* case, as we cite in our proposed findings of
5 law, violation of the constitutional right to counsel of choice
6 is a structural violation and that is automatic basis for
7 reversal, without consideration of prejudice, however minor.
8 And so I don't think consideration of prejudice is relevant to
9 this particular context because of the choice of counsel
10 consideration.

11 And before I leave the topic, the Court does have
12 great discretion in terms of disqualification, but *Curcio*
13 itself, contrary to the government's statement, *Curcio* itself
14 was critical of the disqualification issue. All of the cases
15 that the government cites deal with a situation where it is
16 primary or sole counsel. The only case that is not of that ilk
17 that the government cites, but did not bring up in oral
18 argument, in all candor, I should point to you, is the
19 M-A-S-S-I-M-O case. That is a special case, because *Massimo* is
20 a death eligible case. Under federal statute, 18 U.S.C. 3505,
21 the defendant has a right to both primary counsel and death
22 counsel and so he has a statutory right to effective assistance
23 of two counsel, and in that case, the attorney was disqualified
24 and went into the *Curcio* process because he is not only
25 supplemental counsel, as we are in this case, but he is part of

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1 the statutory right of the effective assistance of counsel.

2 And so where I would leave it with the Court,
3 consistent with Professor Gillers' letter to the Court -- and
4 whether the Court wants to take that as an amicus submission or
5 whatever the format the Court takes it, it is clear that it is
6 perfectly proper for the Court to consider his opinion as not
7 binding but persuasive authority.

8 THE COURT: I think it's helpful.

9 MR. DINH: Right. And indeed, the government itself,
10 in several cases before the Second Circuit, have pointed to
11 expert opinions to guide the court in its decision. So there's
12 no hard-and-fast rule in that regard, because you can cite to
13 treatise or cite to this submission as a basis.

14 I would like to turn it over to my primary counsel --

15 THE COURT: Before you do.

16 MR. DINH: Yes.

17 THE COURT: So here's one particularly troubling
18 aspect to me of this matter. When the conflict issue arose,
19 everybody recognized it and acknowledged it, including
20 yourself, and when I say you, I'm not saying personally, but
21 Kirkland & Ellis lawyers said, well, one way we'll deal with
22 this, as historically in other cases people do, is to establish
23 this ethical wall and to cause a separation between the dual
24 representations. And that's a reasonable approach. But no
25 sooner had that been done than we came to know that the ethical

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1 wall doesn't apply in this HSBC case, which, astonishingly,
2 frankly, is factually not identical but involves very many of
3 the same kinds of charges, namely, that HSBC wilfully did not
4 take precautions to ensure that these alleged illegal
5 transactions benefiting Iran took place. In that very case, we
6 can't have an ethical wall because you and Mr. Clement are
7 arguing, in the Second Circuit Court of Appeals, that case, and
8 arguing, in addition, in favor of the continued lack of
9 disclosure of a report, which one could -- and this is not even
10 such a surmise. To me, it's not even a major jump to conclude
11 that that report, whatever it says, could be helpful to
12 Mr. Zarab if it were made public. I mean, there are other
13 issues, and you all have discussed them in the findings of fact
14 and conclusions of law, but that one jumps out, you know, to
15 anybody who reads it as problematic.

16 MR. DINH: Yes. I will give you an answer and then I
17 will hand it over to my colleague to address that issue.
18 You're absolutely correct that the standard operating procedure
19 in cases like this is to establish an ethical wall, which we
20 did immediately. That ethical wall is a prophylaxis in order
21 to protect any unknowing or violation of our duty of
22 confidentiality that inheres to all our representations, and so
23 in that sense, it prevents us from even an inadvertent
24 violation of Rule 1.6 in the duty of confidentiality. As your
25 Honor correctly observed, that prophylaxis is not there because

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1 Mr. Clement, myself, and Mr. Harris are representing HSBC and
2 have access to the report as issued in that case. That is why
3 we have reaffirmed our obligation under 1.6 to HSBC that we
4 shall keep confidential all material that we gain in that
5 representation.

6 In addition, in addition, we have given them a
7 commitment that they will have an opportunity to review
8 mentions of HSBC, to the extent that it's consistent with our
9 obligation of loyalty to Mr. Zarrab, and so the parade of
10 horrors does not present itself because HSBC would not be
11 able to, nor would it, because it would not be consistent with
12 their obligation to Mr. Zarrab, to veto our submissions simply
13 because it disagrees with our strategy. It is limited to
14 whether or not there has been inadvertent disclosure of
15 confidential information. And where it would not be feasible,
16 consistent with our obligations to Mr. Zarrab, we would not
17 show that to the HSBC. It works with our submission to the
18 Court on the proposed findings of fact and conclusions of law
19 because the only thing that would be of variance in these
20 documents, given the limitations on our representation of
21 Mr. Zarrab, are purely factual questions of the type that we
22 presented in the proposed findings of fact.

23 MR. BRAFMAN: Your Honor, if I may just briefly add
24 some remarks. I'm delighted to be characterized as an
25 effective lawyer, as a lawyer who's going to provide effective

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1 assistance of counsel, but, you know, to be candid with you,
2 sir, part of my effectiveness in this unique and perhaps
3 unprecedented prosecution has been having the assistance of
4 Viet Dinh and his colleagues. And what I'm starting to hear is
5 that because they are laboring under a potential or actual
6 conflict with respect to a bank or two -- and I would add that
7 I don't believe there's going to be any proof whatsoever in
8 this case that Mr. Zarrab had personal interaction with any of
9 these banks, and one of the ways courts in this district and
10 throughout the United States have handled *Curcio* issues when
11 they arise is to either appoint counsel to cross-examine a
12 witness if they appear from one of the potential conflict
13 institutions -- and you have that in this case. I will be the
14 principal trial lawyer, and the fact that Mr. Dinh may have
15 certain ethical difficulties with questioning a bank official,
16 I don't and can vigorously cross-examine them. I can use
17 process to obtain whatever documents from HSBC that I believe
18 are relevant and that the Court can rule, should they bring any
19 motions to quash, and we can keep Viet Dinh and his colleagues
20 out of that fight if it develops.

21 I don't think we should decide today whether
22 Mr. Zarrab will ultimately be able to have the Dinh firm as
23 part of his appellate team because that presumes (A) that
24 there's going to be a conviction, and (B) that in the event
25 there is a conviction, that he's going to choose that firm to

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1 represent him on appeal. So I think that can wait for another
2 day.

3 In terms of this case, Judge, it's beginning to get
4 lonely at the Alamo, let me say, because if we were to
5 disqualify the Kirkland & Ellis firm and I were to then go out
6 and try and find a firm with those kind of resources and
7 staffing and specific talent that they have, I would venture to
8 guess that almost every major firm in New York would probably
9 have some difficulty finding that they don't represent one of
10 the financial institutions in this case, and at the end of the
11 day, Judge, what we all do in this process, at the end of the
12 day, is, you, sir, the government and defense bar, we have to
13 trust each other and the integrity of the people involved.
14 Right now the government has taint teams working on information
15 that the trial team in those cases is not supposed to see,
16 because there are privilege issues, for example. We trust the
17 U.S. Attorney's Office to keep that same taint team from being
18 tainted or from tainting the trial team. Sometimes the agents
19 who are involved end up cross-pollinating, and we trust them
20 not to share information. We have privilege issues on the
21 defense bar, and I think the government gives us some measure
22 of respect when they give us documents under a protective
23 order, and they trust us to honor those agreements.

24 We have a very unique situation here. We have
25 Mr. Dinh, who's been involved in this case from I think the

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1 very beginning. He suddenly finds himself, because of a firm
2 merger, now being challenged as to whether or not he can
3 provide conflict-free assistance. Well, I make several
4 observations. First, I think at the end of the day, you need
5 to decide whether Mr. Zarrab is making a knowing and
6 intelligent waiver so that this issue is removed as an
7 appellate issue in the event of a conviction. You have done
8 everything the district court is supposed to do and then some.
9 It's probably the most thorough of *Curcio* questioning I've ever
10 heard. You have independent counsel who has spent a
11 substantial amount of time interviewing Mr. Zarrab, who
12 understands the conflicts and wants to waive them, and you have
13 primary counsel who wants them to remain on the team with the
14 understanding that, should it arise that HSBC is going to be a
15 witness in this case, one, I will cross-examine those people, I
16 will not ask Mr. Dinh or his partners to disclose confidential
17 information, and if the report which your Honor referenced a
18 moment ago becomes relevant in this case and if I choose to
19 subpoena HSBC, they can't look at me as violating Kirkland &
20 Ellis' confidentiality understandings with them because I'm not
21 bound by it, and I think if it's relevant and the Court orders
22 the materials produced, I think we get to use it, and they can
23 kick and scream, but I don't think there's anything they can do
24 about it. And this is a different case than the normal case,
25 where you have to decide whether a defendant has a right to

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1 counsel of his choice.

2 And I think Mr. Dinh is correct. In almost all of the
3 cases where I've been involved in a *Curcio* proceeding, there is
4 one lawyer who is trying to wear two hats at the same time, and
5 for ethical reasons or for legal reasons, the court decides
6 they just can't do that. Here you have two lawyers wearing
7 different hats, and to the extent that Mr. Dinh must take off
8 his hat for a portion of these proceedings and not participate
9 in that argument, Mr. Zarrah understands that. He waives that
10 as an appellate issue. Mr. Dinh and his colleagues are
11 honorable people who will abide by their ethical obligations to
12 their client, and I will abide by my ethical obligation to
13 Mr. Zarrah.

14 And I want to just point out one other oddity that
15 occurs almost daily in our criminal justice system. I would
16 venture to guess, because I see it on a daily basis, that
17 almost every well-respected law firm in New York and perhaps
18 throughout the United States has one or many former assistant
19 United States attorneys who leave the government and go to work
20 as defense lawyers. And they are indeed at firms who are often
21 representing current cases in the government offices that they
22 just left from, and the understanding they reach is that they
23 can't work on those cases. And that's it. We don't ask them
24 to leave the firm. They are under the ethical obligation to
25 avoid involvement in those cases if they were in the U.S.

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1 Attorney's Office when those cases were investigated or being
2 prosecuted. And we rely on their ethical obligations to do so.
3 And it seems to work because the instances where there are
4 ethical lapses, I must say, approvingly on both sides, are few
5 and far in between.

6 So in this case, Judge, if you disqualify the Kirkland
7 & Ellis firm and you do so because you believe Mr. Zarrab
8 already has responsible, experienced lawyers, you're right, but
9 you have an experienced lawyer who is telling you that I need
10 the resources of that firm, and to recuse them now and to give
11 us the need to start from the beginning with another firm and
12 find a firm that doesn't have any potential conflict is a
13 Herculean undertaking. This case involves over a million
14 documents. There have been legal issues briefed in this case
15 that are unique to this case and that, to my knowledge, have
16 never before been briefed in this or any other courthouse, and
17 I think, to the extent that I'm able to try this case, I
18 submit, with great respect for the Court, for Viet Dinh, and
19 with great respect for my ability, I'm not embarrassed to tell
20 you I need their help. So this is not only a question of
21 giving him counsel of his choice; this is a question of, if you
22 recuse them, you are interrupting, respectfully, a proceeding
23 that's already gone on for nine months with the defendant in
24 remand, and although the government suggests that, well,
25 there's eight months, that's certainly enough time to replace

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1 them, that's easier said than done, and Mr. Zarrab should not
2 have to go through the extraordinary expense, with all respect
3 to the legal fees in this case, to reeducate a whole team of
4 new lawyers and bring them up to where Mr. Dinh and his
5 colleagues already are.

6 Thank you, sir.

7 THE COURT: Okay. So I think I've heard enough. The
8 record is full. I'll make a couple of points, just to close
9 the loop.

10 One is that I am certainly respectful of the counsel
11 of choice issue, and I'm conversant with the law that applies
12 there. I'm also conversant with the issue of counsel of choice
13 versus conflict-free counsel. Just point number one.

14 Second, you raised the issue of trust, Mr. Brafman,
15 appropriately so, and I just want to assure you that I'm not
16 distrustful of anybody in this proceeding, so to speak. I do
17 understand your point about how we all work together, defense
18 and government and the Court, and relatedly, I don't view this
19 as a personal matter. I'm not in any way considering anybody's
20 bona fides. I think everybody in this proceeding is
21 professional. I'm respectful of all counsel. Kirkland & Ellis
22 is certainly an outstanding firm, and Mr. Dinh and Mr. Clement
23 in particular are top of the line, so to speak, in terms of
24 counsel.

25 Also, I'm not worried, honestly, about appeal. I look

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1 at these issues, try to get them right, and I try to hold that
2 off to the side about how somebody else might view them, except
3 to the extent that it bears on whether I've made the right
4 determination or not.

5 I am concerned about the integrity of the proceeding,
6 in this case, in every case. This case is a little bit
7 different in that regard, and there is obviously a broader
8 community that is interested and observing of this case,
9 international community, which might not be true in perhaps
10 some of our more limited or narrow or traditional criminal
11 cases that we might do here in the Southern District, and I do
12 want to make sure that everything I do and have tried to make
13 sure that everything I do in this case up until now is fair and
14 is demonstrably fair, in particular to this broader community
15 that may be interested in viewing this case.

16 So with all that in mind and with my thanks for
17 typically excellent findings of fact and conclusions of law and
18 oral presentations, I'll close the record of the *Curcio*
19 proceeding and get you a ruling as soon as practicable.

20 Thank you very much. Good to see you all.

21 ALL COUNSEL: Thank you, your Honor.

22 (Adjourned)
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25